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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte Thomas J. Sisk

Appeal 2009-003620
Application 10/810,797
Technology Center 3700

Decided:¹ July 31, 2009

Before JAMESON LEE, SALLY G. LANE, and MICHAEL P. TIERNEY,
Administrative Patent Judges.

TIERNEY, *Administrative Patent Judge.*

DECISION ON APPEAL

A. STATEMENT OF THE CASE

This is a decision on appeal by the real party in interest, Masco Corporation, under 35 U.S.C. § 134(a) from a final rejection of claims 7-9

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

and 21-24. Claims 1-6, 13-19, and 25 were cancelled prior to this appeal. Claims 10-12 and 20 stand allowed. Appellant requests reversal of the Examiner's final rejection. We have jurisdiction under 35 U.S.C. § 6(b). We affirm-in-part.

References Relied on by the Examiner

Primucci	4,578,832	Apr. 1, 1986
Wissinger	4,671,026	Jun. 9, 1987
Dron	6,677,020	Jan. 13, 2004

The Rejections on Appeal

The Examiner rejected claims 7-9 and 21 under 35 U.S.C. § 102(b) as anticipated by Primucci. The Examiner rejected claims 22-24 under 35 U.S.C. § 103(a) as unpatentable over Primucci in view of Wissinger or Dron.

Claim 7 is the only independent claim. Appellant argues dependent claim 8 collectively with claim 7. Appellant provides separate arguments for dependent claims 9, 21, and 22-24.

The Invention

The invention relates to a retainer assembly for a shower surround having inner and outer band sections. (App. Br. 8, Claims App'x.; Spec. ¶¶ 0019-24²). The retainer assembly is mounted to an outer band section, and has a first frame arm opposed by a second frame arm, and a stop which extends from one of the first or second frame arms, wherein the inner band section is received against the stop between the opposing arms. (*Id.*). Claim

² References to the specification are to U.S. Publication 2005/0210577.

7 is representative of the claimed invention and is reproduced below:

7. A shower surround comprising:
a first surround section comprising an inner band section;
a second surround section comprising an outer band section;
and
a retainer assembly mounted to said outer band section, said
retainer assembly comprising a first frame arm opposed to a second
frame arm and a stop which extends from one of said first frame arm
and said second frame arm, said inner band section receivable against
said stop and between said first frame arm and said second frame arm.

(App. Br. 8, Claims App'x.).

B. ISSUE

1. Has Appellant demonstrated that the Examiner incorrectly determined that Appellant's claimed retainer assembly comprising a first frame arm, a second frame arm and a stop encompasses Primucci's retainer assembly which in addition to the frame arms and stop also contains blocks and a bolt?
2. Has Appellant demonstrated that the Examiner incorrectly determined that Primucci's gasket inherently comprises multiple seals?
3. Has Appellant demonstrated that the Examiner incorrectly determined that one of ordinary skill in the art would have combined a seal with a retainer assembly having a stop?

C. FINDINGS OF FACT

The record supports the following findings of fact (FF) by a preponderance of the evidence.

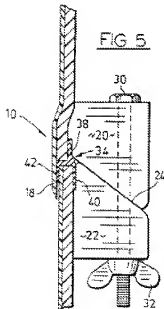
Appellant's Specification

1. Appellant's specification describes the inner band section as a lower surround section that is located in the interior of a band and describes the outer band section as an upper surround section that is located at the outside of the band (facing the user of the shower). (Spec., ¶¶ 0019-20; Figs. 1 and 2B).
2. Appellant's specification teaches that the inner band section may include ribs and further describes the ribs as "raised areas formed in the surround surface" having "various shapes." (Spec. ¶ 0019).

Primucci

3. Primucci discloses a plastic shower enclosure including a first surround section (unnumbered middle section) and a second surround section (unnumbered upper section), wherein both sections are separated by an upper band 10. (Primucci, col. 3, l. 65 to col. 4, l. 3, Figs. 1 and 3-5).
4. Primucci Figure 5, reproduced below, depicts the band 10 and the (unnumbered) first and second surround sections:

Figure 5 is reproduced below:



Primucci Figure 5 reproduced above depicts the band 10 and the first and second surround sections.

5. Primucci's first surround section (middle section) forms the inner lower part of the band 10 and the second surround section (upper section) forms the upper outer part of the band 10. (*Id.* at col. 4, l. 64 to col. 5, l. 6 (discussing overlapping), Figs. 1, 2C, 3, and 5). Accordingly, the first surround section comprises an inner band section and the second surround section comprises an outer band section. (*Id.*).
6. Primucci teaches that the inner band section has a block 22 and that the outer band section has another block 20. Primucci further teaches that the blocks 20, 22 each have a vertically directed bore 24 that extends through the blocks 20, 22 to allow the sections to be secured together via a bolt 30 and wing nut 32. (*Id.* at col. 5, ll. 7-37).
7. Primucci further teaches that a rubber gasket 34 may be used as part of the shower assembly in combination with the blocks and bolt. (*Id.* at col. 5, ll. 58-60). In particular, as shown in Figure 5, the blocks are recessed to receive portions (frame arms) of the gasket such that the blocks, bolt and gasket retain the inner band section. (*Id.* at col. 5, l. 68 to col. 6, l. 1).
8. Primucci's rubber gasket 34 is located such that it provides a vertical and horizontal separation between the panels; thereby restraining the inner and outer band sections from contacting one another. (*Id.* at Fig. 5).
9. Primucci teaches that the first surround section comprising the inner band section, further includes a shelf 14. (*Id.* at col. 3, l. 65 to col. 4, l. 1).

Wissinger

10. Wissinger teaches a bathtub seal assembly 58 having walls 66, 68, and 70 that are formed of a rigid or semi-rigid plastic as well as flexible finger

type seals 72, 74, 76, and 78 formed from a flexible material. (Wissinger, col. 5, ll. 22-64, Figs. 3 and 9).

11. Wissinger's walls 66, 68, and 70 receive the end of a side panel 30 and act as a stop because of their semi-rigid or rigid structure. (*Id.* at Fig. 3).

D. PRINCIPLES OF LAW

A claim is anticipated when each and every element as set forth in the claim is found, either expressly or inherently described in a single prior art reference. *Verdegaal Bros., Inc. v. Union Oil Co.*, 814 F.2d 628, 631 (Fed. Cir. 1987).

An invention is not patentable under 35 U.S.C. § 103 if it is obvious. *KSR Int'l Co. v. Teleflex Inc. (KSR)*, 550 U.S. 398, 406 (2007). In particular, the combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results. *Id.* at 416.

We give claims their broadest reasonable interpretation consistent with the specification. *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989). Comprising is a term of art used in claim language to signify that a claim is inclusive or open-ended and does not exclude the presence of additional, unrecited elements. *CIAS, Inc. v. Alliance Gaming Corp.*, 504 F.3d 1356, 1360-61 (Fed. Cir. 2007). As such, a comprising claim is anticipated when each and every element as set forth in the claim is found even though the prior art may include an additional element. *Medichem, S.A. v. Rolabo S.L.*, 353 F.3d 928, 934-35 (Fed. Cir. 2003).

E. ANALYSIS

The Rejection of Claims 7 and 8 as Anticipated by Primucci

As discussed above, the Examiner rejected independent claim 7, along with claims 8-9, and 21, under 35 U.S.C. § 102(b) as anticipated by Primucci. Appellant argues the patentability of independent claim 7 and dependent claim 8 collectively.

The Examiner found that Primucci teaches a shower surround meeting all of the limitations of claim 7. (Ans. 3). Specifically, the Examiner found that Primucci teaches a shower surround having a first surround section (middle section) comprising an inner band section and a second surround section (upper section) comprising an outer band section. (*Id.*). The Examiner further found that Primucci teaches a gasket 34 that forms part of a retainer assembly and meets all of the limitations of the retainer assembly recited by Appellant's claims. (*Id.* at 3 and 5).

Appellant contends that the Examiner erred in finding that Primucci's gasket 34 was a retainer. (App. Br. 3-5; Reply Br. 2). Specifically, Appellant reasons that the gasket 34 is only a seal, and may not be interpreted as a retainer assembly, because Primucci already teaches a retainer assembly, comprising a bolt 30 and block 20, 22 mechanism. (*Id.*). Appellant further contends that Primucci's gasket cannot be a retaining assembly, because it is taught as an optional component. (App. Br. 4-5; Reply Br. 2).

Appellant's claims are directed to a retainer assembly comprising a first frame arm, a second frame arm and a stop. Appellant's use of the "comprising" transitional phrase signals that the retainer assembly is inclusive or open-ended and does not exclude the presence of additional, unrecited elements. *See, CIAS, Inc. v. Alliance Gaming Corp.*, 504 F.3d 1356, 1360-61 (Fed. Cir. 2007). Thus, the question is not whether

Primucci's gasket is a retainer, but whether Primucci's gasket forms a part of a retainer assembly comprising the recited structure.

Primucci describes a gasket 34 that meets Appellant's claimed retainer assembly structure. Specifically, gasket 34 has the required first frame arm opposed to a second frame arm and a stop extending from one of the arms. The gasket 34 is located such that it separates the respective inner and outer bands. (FF 7-8). Primucci describes blocks and a bolt that, in combination with the gasket 34, helps retain the first and second surround sections in place, i.e., the blocks, bolt and gasket form a "retainer assembly." In particular, gasket 34 restrains movement and prevents contact between the respective sections. (*Id.*).

We hold that Primucci's retainer assembly meets the limitations of Appellant claim 7 as Appellant's retainer assembly does not exclude the presence of Primucci's blocks and bolt that, in combination with gasket 34, retain the first and second sections.

Appellant contends that Primucci's gasket cannot be a retaining assembly because it is an optional component. (*See*, App. Br. 4-5; Reply Br. 2). The issue of anticipation depends upon whether all of the claimed features are taught. Appellant does not dispute that Primucci describes in words and figures the use of a gasket to separate its first and second shower surround sections. The fact that Primucci does not require the use of the gasket in all of its embodiments does not negate the fact that such a shower surround gasket is described.

We affirm the Examiner's rejection of claims 7 and 8 as anticipated by Primucci as Appellant's claims encompass Primucci's described retainer assembly.

The Rejection of Claim 9 as Anticipated by Primucci

Claim 9, depends from Claim 7, and further requires that the inner band comprises a rib that extends therefrom. (App. Br. 8, Claims App'x.). The Examiner found that Primucci's shelf 14 was part of the inner band section and is a rib. (Ans. 3 and 5). Appellant contends that Primucci does not have an inner band including a rib extending therefrom. (App. Br. 5). Specifically, Appellant contends that the Examiner erred in finding that Primucci's shelf 14 was a rib because "the shelf 14 is not received between the arms of a retainer assembly and therefore cannot be interpreted to be the rib." (*Id.*). Further Appellant contends that the shelf 14 "is not even located at the raised band." (*Id.*).

Appellant's contentions are not commensurate with the scope of the claim. Specifically, claim 9 requires that the inner band have a rib extending therefrom. Claim 9 does not require the rib to be between the arms of the retainer assembly, nor does claim 9 require the rib to be located at the raised band. Furthermore, Appellant's specification describes ribs as "raised areas formed in the surround surface" having "various shapes." (FF 2). Primucci's inner band section has a shelf 14 formed thereon which is a raised area formed in the surround surface of the inner band. (*See*, FF 5 and 9). Accordingly, Appellant has failed to demonstrate that the Examiner incorrectly determined that Primucci's shelf 14 was met Appellant's definition of a rib.

The Rejection of Claim 21 as Anticipated by Primucci

Claim 21, depends from claim 7 and further requires "a multiple of seals" mounted within said retainer assembly to receive the inner band. The Examiner found that Primucci's gasket 34 inherently taught a retainer

having a “multiple of seals.” (Ans. 3). The Examiner’s position is that the gasket has several surfaces, each of which can constitute a separate seal. Appellant contends that “[t]he Examiner has pointed to nothing within Primucci that discloses a retainer member having a multiple of seals.” (App. Br. 5).

We provide Appellant’s claims with the broadest reasonable interpretation in light of the specification. Appellant’s specification identifies multiple seals as distinct and separate seals. (See, e.g., ¶¶ 0020-21, and 23, Fig. 2B, 38a, 38b, 38c). Appellant’s specification does not identify multiple surfaces of the same seal to be “multiple” seals. In particular, Appellant’s seal 38a is identified as a single seal even though 38a possesses several surfaces, each of which “seals” the inner surface of the surround. (*Id.*). The broadest reasonable interpretation of the term “multiple of seals” in light of Appellant’s specification is that a multiple of seals requires separate and distinct seals and does not encompass multiple surfaces of the same seal.

Primucci describes a gasket 34. The gasket can act as a seal. The gasket however, is a single unitary object and does not constitute a “multiple of seals” as required by Appellant’s claim 21. Accordingly, we hold that Appellant’s have demonstrated that the Examiner incorrectly determined that Primucci teaches a multiple of seals.

The Rejection of Claims 22-24 as Obvious over Primucci in view of Wissinger or Dron

Claim 22 depends from claim 7, and further requires a seal mounted to a stop to receive an end segment of the first inner band. Claims 23 and 24

depend from claim 22. The further limitations of claims 23 and 24 are not in dispute.

The Examiner acknowledged that Primucci “fails to show a seal mounted to a stop,” because Primucci’s entire gasket is made from a sealing material. (Ans., 4). However, the Examiner found that Wissinger and Dron both teach mounting seals to stops. (*Id.*) The Examiner determined that it would have been obvious to one of ordinary skill in the art to have utilized a retainer having a seal mounted to a stop in view of either Wissinger or Dron. (*Id.* at 4-5). Appellant disagrees and contends that the “there is no benefit to mounting a seal to a gasket that is also a seal.” (App. Br., 6).

Wissinger teaches a bathtub seal assembly 58 having walls 66, 68, and 70 that are formed of a rigid or semi-rigid plastic. Wissinger also teaches multiple flexible finger type seals 72, 74, 76, and 78 formed from a flexible material that are mounted to the walls 66, 68, and 70. (FF 10). Wissinger’s walls 66, 68, and 70 receive the ends of a side panel 30 and act as a stop because of their semi-rigid or rigid structure. (FF 11). Accordingly, Wissinger teaches a seal mounted to a stop.

One of ordinary skill in the art understood that various types of seals could perform the function of preventing water from intruding out of the shower surround. One of ordinary skill in the art also would have understood that multiple seals may be used for added protection against water intrusion. The combination of familiar elements (different types of water seals) according to known methods (forming a seal with a stop) would have obvious to one of ordinary skill in the art as it does no more than yield the predictable result of preventing water intrusion into the areas behind the shower. As the claims have been shown to be obvious over Primucci in

view of Wissinger, we need not reach the issue of whether the claims would also have been obvious over Primucci in view of Dron.

F. CONCLUSION

1. Appellant has not demonstrated that the Examiner incorrectly determined that Appellant's claimed retainer assembly comprising a first frame arm, a second frame arm and a stop encompasses Primucci's retainer assembly which in addition to the frame arms and stop also contains blocks and a bolt.
2. Appellant has demonstrated that the Examiner incorrectly determined that Primucci's gasket inherently comprises multiple seals.
3. Appellant has not demonstrated that the Examiner incorrectly determined that one of ordinary skill in the art would have combined a seal with a retainer assembly having a stop.

H. ORDER

The rejections of claims 7-9 under 35 U.S.C. § 102(b) as anticipated by Primucci are affirmed.

The rejection of claim 21 under 35 U.S.C. § 102(b) as anticipated by Primucci is reversed.

The rejections of claims 22-24 under 35 U.S.C. § 103(a) as unpatentable over Primucci in view of Wissinger or Dron are affirmed.

FURTHER ORDERED no time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

Appeal 2009-003620
Application 10/810,797

AFFIRMED-IN-PART

rvb

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